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THE LEGAL IMPLICATIONS OF SONY'S CYBERHACK

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I. Introduction

In December 2014, Sony Entertainment found itself in a political controversy that even the best writers in Hollywood could not fabricate. On November 24, 2014, Sony encountered a hacking of their servers that shut down Internet connection, as well as leaked hundreds of documents ranging from emails from top-level executives and celebrities, to confidential business material concerning upcoming projects.¹ After investigating the leak, the North Korean government appeared to be the lead suspect responsible for the hack.² Allegedly, North Korea was outraged by the portrayal of their leader, Kim Jong-un, in Sony's upcoming film, *The Interview*. They claimed that if Sony released the movie to theaters, more damage was imminent.³ The topics surrounding this controversy raise intriguing legal questions. This note will address two issues in regards to North Korea's alleged response to Sony's portrayal of Kim Jong-un in *The Interview*. First, did Jong-un have legal cause to sue the filmmakers for infringing on his right to publicity? Second, did North Korea violate international law for an illegal use of force (assuming North Korea was the perpetrator)?

¹ David Robb, *Sony Hack: A Timeline*, DEADLINE HOLLYWOOD (Dec. 22, 2014, 1:25 PM), <http://deadline.com/2014/12/sony-hack-timeline-any-pascal-the-interview-north-korea-1201325501/>.

² *FBI Director Reveals New Evidence Linking N. Korea to Sony Hack, Answers Skeptics*, FOX NEWS (Jan. 7, 2015), <http://www.foxnews.com/politics/2015/01/07/fbi-director-reveals-new-evidence-linking-n-korea-to-sony-hack-answers-skeptics/>.

³ Robb, *supra* note 1.

First it is necessary to analyze the development of common law on the right to publicity, and the requirements necessary to support a valid claim. If Jong-un can meet these requirements, there is an important line between a person's right of publicity in contrast to another's right to free speech. Jong-un's impact as an important historical figure will also play a role in determining whether he has a legitimate case. Historical icons may not maintain the same protection as an actor or athlete who have reached a certain level of notoriety before the First Amendment rights of the creators become more expansive.

Next, there is the question of whether a cyber attack amounts to an illegal use of force under international law. While there is no set codified international law for relations among nations, there are many widely accepted principles that should be followed. One of which is that the use of force on another nation is considered a violation of international law.⁴ An issue has arisen as of late whether or not a cyber attack such as this constitutes a use of force. Lastly, if it was to be considered an illegal use of force, what measures could Sony and the United States take in response to the attack?

II. The Principles Behind the Right of Publicity

The right to publicity originated from a landmark case decided by the United States Supreme Court in 1977. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the plaintiff (Zacchini) performed a "human cannonball" act in which he shot from a cannon into a net 200 feet away. Zacchini brought suit against the Scripps-Howard Broadcasting Company after their news reporter filmed and aired his performance on their channel.⁵ He claimed the broadcast was

⁴ U.N. Charter art. 2, para. 4.

⁵ 433 U.S. 562 (1977).

an “unlawful appropriation” of his “professional property.”⁶ The case came to the U.S. Supreme Court after the Ohio Supreme Court held that although Zacchini did have a valid cause of action, Defendants should not be held liable because “it is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity[.]”⁷ Even though Plaintiff had a claim under a violation of state law, the Ohio Supreme Court said the media defendant was entitled to protection under the First and Fourteenth Amendments. This claim originated from cases such as *Times Co. v. Sullivan*, where it was found that certain protections were granted to the press to help promote the public’s interests.⁸ In front of the Supreme Court, Petitioner Zacchini argued, not that the media Respondent reporting about his performance violated his right of publicity, but the fact that they broadcasted his whole act for the entire public to see hampered his “exclusive control over the publicity given to his performances.”⁹

The U.S. Supreme Court made a very important distinction here from the reasoning of the Ohio Supreme Court. The state court’s holding rested heavily on *Time, Inc. v. Hill*, which did not involve a person with commercial value or fame attached to their name.¹⁰ Therefore, the Supreme Court distinguished the claim in *Time* and the one present here. The state held a different interest for each instance. One claimant sought recovery for damage to his reputation, in other words defamation, whereas in the case at hand, the issue relates to protecting “the proprietary interest of the individual in his act in part to encourage such entertainment,” which

⁶ *Id.*

⁷ *Id.* at 562.

⁸ 376 U.S. 254 (1964).

⁹ *Zacchini*, 433 U.S. at 569.

¹⁰ 385 U.S. 374 (1967).

evolves from the same theories as patent and copyright law as opposed to defamation.¹¹ The cases also differ “in the degree to which they intrude on dissemination of information to the public.”¹² Essentially, the Court held that one who’s right of publicity is being threatened is not as concerned with the publication of the matter to cease as one who is placed in a false light is. The former merely seeks compensation for their published work.

This crucial distinction establishes the birthplace of a person’s right to publicity. The economic value of one’s performance is vital as it serves as an incentive for members of society to continue creating. “The broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.”¹³ The Court held in favor of the Petitioner, holding that Respondent has no more Constitutional protection over the broadcast than would the broadcaster of a copyrighted dramatic work, or a baseball game, without the approval of the owner.¹⁴

A. Modern Application of the Right of Publicity

In the years following *Zacchini*, the right of publicity has developed into its own common law tort. California codified the requirements of the tort in their civil law. It states one will be liable if he or she:

uses another’s name voice, signature, photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, except in connection with any news, public affairs, or sports broadcast or account, or any political campaign, without such person’s prior consent, shall be liable for damages sustained by the person or persons injured as a result thereof.¹⁵

¹¹ *Zacchini*, 433 U.S. at 573.

¹² *Id.*

¹³ *Id.* at 575.

¹⁴ *Id.*

¹⁵ CAL. CIV. CODE § 3344 (West 1997).

As the movie and video game industry continue to grow, producers more frequently base their work on characters commonplace in society. With this, the risk of liability for violating the right of publicity increases as well. Common roles in these works include popular political figures. Kim Jong-un was not the first foreign leader to be used in a production in recent memory. The California Courts faced this issue months before when former Panamanian dictator, Manuel Noriega sued video game makers, Activision Blizzard, for infringing on his right to publicity by using him as a character in their latest video game, *Call of Duty Black Ops II*.¹⁶

Noriega filed his complaint against Activision in the Superior Court of California on July 15, 2014. His complaint sought damages on three different bases; violation of California Civil Code § 3344 and common law right of publicity, unjust enrichment, and unfair business practices in violation of California Business and Professions Code § 17200.¹⁷ Noriega based his claims on the grounds that Activision used his image and likeness without authorization and consent in order “to increase the popularity and revenue generated by Black Ops II[.]”¹⁸ He further claimed that this unauthorized use caused damage to his reputation by portraying him as an antagonist and the “culprit of numerous fictional heinous crimes[.]”¹⁹ Noriega believes that Activision’s portrayal of him attributed to profits they otherwise would not have received. Noriega argued that Activision violated this section for he was readily identifiable in the video game, as well as being identified by name, and that this unauthorized use was “willful, intentional, and

¹⁶ Eugene Volokh, *Can Manuel Noriega Really Win His “Right of Publicity” Lawsuit Against Activision?*, WASH. POST (July 17, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/17/can-manuel-noriega-really-win-his-right-of-publicity-lawsuit-against-activision/>.

¹⁷ Complaint at 1, *Noriega v. Activision Blizzard*, No. BC551747 (Cal. Super. Ct. July 15, 2014), 2014 WL 3611852.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

knowing, and was done for the direct purpose of profiting off of and gaining a commercial benefit through the popularity and sales of Black Ops II.”²⁰ This violation allegedly caused Noriega to suffer harm “including but not limited to damage to his reputation and denial of the benefit of the rights of publicity which belong to him.”²¹

While many called this case a farce, and a mockery of the judicial system, the claim held some merit. Not long ago, Activision lost a similar case when pop band No Doubt sued for the improper use of their likeness in a video game. As professor and writer Eugene Volokh wrote, “under the broken and unpredictable ‘right of publicity’ law,” Noriega could potentially come out of this case “and maybe even the use of his name in any ordinary novels,” successfully.²²

This case had much greater implications than seeking damages for an incarcerated Panamanian prisoner. Noriega was not merely a musician, or an actor, but an important figure in United States, and world history. Former Mayor of New York City and current practicing lawyer, Rudy Giuliani, represented Activision in this suit. He explained why it was imperative that Noriega not be successful in his suit. His first defense comes straight from the Constitution; he argues that the First Amendment protects the company’s freedom of speech and Activision’s right to use the character resembling Noriega.²³

While it may seem like an average civil suit where a plaintiff targets a major company looking to recover exorbitant damages for a miniscule offense, depending on the result, this case could have a rather large impact on both major media outlets, and the way history is portrayed in the United States. Giuliani explains why the outcome of this case is so important:

²⁰ *Id.* at 6.

²¹ *Id.* at 5.

²² Volokh, *supra* note 16.

²³ Order on Defendants’ Special Motion to Strike at 5-6, *Noriega v. Activision Blizzard*, No. BC551747 (Cal. Super. Ct. October 27, 2014).

Noriega is a historical figure of some prominence, and he's been included in a small way in this video game. Games are, for legal purposes, considered the same as movies and books, so if he can censor this, if he can recover, then every person with historical significance who's included in a book or a video game would then be able to censor their involvement and that could seriously interfere with the creative rights of authors.²⁴

He argues a historical exception to one's right to privacy exists, and that if one puts themselves in a position that exposes them to major historical events, then that person's right to publicity should be waived. Based on this argument, Giuliani believes that if the Court allowed Noriega's complaint to prevail, then Osama bin Laden's family could sue filmmakers for his depiction in "Zero Dark Thirty." Likewise, any time an actor played a current or former President of the United States in a movie, the producers would first have to get their approval. The burden placed on the arts and media would significantly hamper those trying to tell a historic story in the form of book, movie, or now video game even.

The First Amendment is not to be forgotten in this analysis. Courts give great deference to artists in these cases so as to not violate their First Amendment rights.²⁵ One way they protect this Constitutional right is by applying the "transformative use" test. This judiciary-based test came into existence when an artist was taken to court for benefitting commercially by placing representations of the Three Stooges on t-shirts.²⁶ It was created to avoid the possibility of awarding damages to a celebrity whose likeness was utilized at the expense of "censoring significant expression by suppressing alternative versions of celebrity images[.]" This way protection to the creator's intellectual property is provided when society deems it to have social

²⁴ Keith Stuart, *Giuliani on the Call of Duty Lawsuit: 'Noriega Does Not Own History,'* GUARDIAN, Oct. 21, 2014, <http://www.theguardian.com/technology/2014/oct/21/giuliani-call-of-duty-lawsuit-noriega>

²⁵ No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018 (2011).

²⁶ Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).

utility.²⁷ To satisfy the test, the creator must add something new to the character, or alter him in some way that significant elements are “transformed.”²⁸ This includes things like parodies and distortions of celebrities.

Noriega argued the transformative use test should be applied in his case the same way it was in *No Doubt*, when the band sued for their unauthorized use in the video game “Band Hero.”²⁹ To overcome the First Amendment protection provided to a defendant, plaintiff must prove that no trier of fact could reasonably conclude that the use is transformative.³⁰ This was found in *No Doubt* when Activision’s use of the band was “‘conventional, more or less fungible, images’ of its members that No Doubt should have the right to control and exploit.”³¹ Noriega claimed that Activision committed the same act here by creating “a character in its *Black Ops II* game that was nothing more than a conventional, high-tech recreation of General Manuel Noriega. Even the setting that Noriega is situated in throughout the game is non-transformative.”³²

Fortunately for Activision, media producers, and First Amendment proponents everywhere, in October 2014 the Court dismissed Noriega’s case on multiple grounds. First, they

²⁷ *Id.* at 802-03, 804.

²⁸ *Id.*

²⁹ *No Doubt*, 192 Cal. App. 4th 1018.

³⁰ Plaintiff’s Response to Defendants’ Special Motion to Strike Plaintiff’s Complaint Under the California Anti-SLAPP Statute at 12, *Noriega v. Activision Blizzard*, No. BC551747 (Cal. Super. Ct. September 22, 2014) [hereinafter Plaintiff’s Response] (citing *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1274 (9th Cir. 2013); *Comedy III Prods.*, 21 P.3d at 811 (“Although the distinction between protected and unprotected expression will sometimes be subtle, it is no more so than other distinction triers of fact are called on to make in First Amendment jurisprudence.”))

³¹ *No Doubt*, 192 Cal. App. 4th at 1035.

³² Plaintiff’s Response, *supra* note 30, at 10-11.

stated that Activision’s Constitutional right to free expression outweighed Noriega’s right of publicity interest. The Court relied on *Guglielmi v. Spelling-Goldberg Productions*, which said:

Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological words or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody, and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.³³

The Court held that because of Noriega’s storied past as a General in the Panamanian army, and Dictator of Panama, he engrained himself in history as one of the more notable figures of the 1980s. The Court also deemed the work to be transformative because the portrayal of Noriega was not the “very sum and substance” of the overall work.³⁴ The also concluded that because Noriega played such a minor role in the video game, his representation in the video game was not a significant factor to the overall work.

B. *The Interview* and the Right to Publicity

After seeing how Noriega fared in the California courts, would Kim Jong-un face the same fate if he attempted to sue Sony for violating his right to publicity by using him as a character in *The Interview*? The movie is about a famous TV host and his producer (played by James Franco and Seth Rogen, respectively) who travel to North Korea for an exclusive private interview with the North Korean leader. Trouble arises when a CIA agent arrives at their door

³³ Order on Defendants’ Special Motion to Strike at 2, *Noriega v. Activision Blizzard*, No. BC551747 (Cal. Super. Ct. Oct. 27, 2014), 2014 WL 5930149 [hereinafter Order] (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869 (1979)).

³⁴ *Id.*

and assigns them an alternative task, to kill Jong-un.³⁵ Looking at the requirements set forth in the California civil code, Un could prevail. They used his likeness for a commercial purpose, assumingly without his consent. Does that make Sony liable? At first glance it seems a judge would rule the same in this case as the decision to dismiss Noriega's suit. There are some key differences however that could lead to Kim Jong-un winning on the merits of this case.

First, I find it highly implausible that Sony would pass the transformative use test. Now I have not seen the movie, so I only speculate based on what has been presented in the news and in the trailers, but it is clearly evident that the character in the film is named Kim Jong-un, and is the leader of North Korea. The filmmakers put forth no effort to alter him in any manner. Sony may attempt to argue the character is a parody of Un, depending on how he is portrayed in the film, but it may not hold. For instance, in one trailer for the film Un is giving Franco's character a tour of his compound, in which the two find themselves inside of Un's tank. While in the tank, the two begin socializing and Franco finds that Katy Perry is playing in the tank. This was a CD left in the tank by Un and the two began singing together. As I do not know Un or his music taste, I cannot say this with certainty, but I feel that it is a safe bet that Un is not a big Katy Perry fan, and surely does not play her music in his tanks. The point being, that by portraying Un as a fun loving fan of pop music who enjoys the American culture, a court may be willing to side with Sony's argument that the portrayal of the character was transformative.

Another difference between *The Interview* and *Call of Duty, Black Ops II* favoring Un is the extent of the role that the foreign dictator plays in the work. In *Call of Duty*, Noriega's

³⁵ *Storyline for The Interview*, IMDB, <http://www.imdb.com/title/tt2788710/> (last visited May 16, 2015).

character had a minor role in what is called the “Campaign” mode of the video game.³⁶ He appears in only a few of the missions throughout the campaign and contributed very little to the overall outcome.³⁷ Also, Noriega was not a focal selling point of the game. He was not a main aspect of the video game as No Doubt was in their case that Noriega relied heavily on. He was never on the cover, and any exposure that his character may have had in the advertising of the video game was minimal and incidental. In the court’s words, the character was not the “sum and substance” of the work.³⁸ *The Interview* on the other hand, is a completely different story. The whole plot of the movie focuses on Un’s character; he is arguably the most important character in the film. The fact that the North Korean nation was so frustrated with the use of Un in the film that they supposedly hacked into Sony’s server³⁹ and made severe threats of what would happen should they release the film into theaters shows how critical he was to the overall work in the film. Un was promoted and advertised as a focal selling point of the film throughout the entire process. He was an imperative aspect to the economic and critical success of the film.

In the end however, although his likeness was used without his consent for economic and commercial gain, and Sony would have a difficult time showing that his character was transformative; I believe if this matter were heard in court, Jong-un would not have a successful case. There is such a heavy importance placed on the First Amendment in our country, and the court system is quite hesitant to sacrifice the Constitutional rights of Americans to benefit a foreign dictator that already has troubled relationships with this country. The courts do not want to inhibit the message of an artist’s creation by forcing him to create fictional characters to

³⁶ Order, *supra* note 33, at 3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Discussed below in more detail

deliver the expression. “No author should be forced into creating mythological worlds or characters wholly divorced from reality.”⁴⁰ If he has not done it yet, by the time it is all said and done, Un will have etched himself in history as one of the most notable historical figures of our time, and his prominence as a piece of the world’s history will open him up to the satire and parody that comes with being a world leader. Unfortunately for Sony, Un chose to bypass the U.S. Court system in seeking retribution. Because of this, he handled the issue by leading North Korea in a cyber attack against Sony.

III. International Law on Cyber Hacks

After the excitement and scandal settled from the Sony infiltration, many concerns were raised nationwide. If a multinational corporation such as Sony was able to have their most private files along with their dirty laundry aired to the world, who else would be vulnerable? Even more turmoil arose after the allegations that the hackers (going by the name “The Guardians of Peace”), were agents working under the authority of North Korea. Relations between North Korea and the United States have always been rough, but many fears were raised if the North Koreans actually began “attacking” the United States. The question was though; did North Korea do anything illegal? And if so, what could the United States do about it? Was this “cyber attack” more of a political scandal, or was it a breach of international law?

Determining whether a nation violates international law is a complicated process. It is difficult to say whether general principles in relations among foreign nations are actually international laws or just proper custom. Laws developed in international relations are not codified like traditional domestic law, instead over time there are general preemptory norms

⁴⁰ Order, *supra* note 33, at 2 (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869 (1979)).

established that become customs all nations are required to abide by.⁴¹ These principles can fall under the classification of either Jus Cogens or Customary International Law (CIL). Jus Cogens is considered “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”,⁴² while CIL is a general principle that all nations abide by through an objective view point that it is consistent state practice that is also subjectively believed by nations to be followed by international law.⁴³ International laws can only be formed from either treaties, or from principles that have been practiced over a significant period of time. That is why deciding whether international cyberattacks violate international law falls into a grey area. “There are no treaty provisions that directly deal with ‘cyber warfare’. Similarly, because State cyber practice and publicly available expressions of *opinion juris* are sparse, it is sometimes difficult to definitively conclude that any cyber-specific customary international law norm exists.”⁴⁴

“Perhaps the only generally accepted example [of jus cogens] is the prohibition on the use of force as laid down in the UN Charter.”⁴⁵ Article 2(4) of the United Nation Charter states “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

⁴¹ LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979).

⁴² Vienna Convention on the Law of treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

⁴³ INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, REPORT OF THE SIXTY-NINTH CONFERENCE, LONDON 712 (2000).

⁴⁴ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 5 (Michael N. Schmitt gen. ed., 2013).

⁴⁵ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 279 (3d ed. 2013).

with the Purposes of the United Nations.”⁴⁶ This provision prohibiting the use of force is a cornerstone in international law. Not only is it agreed upon by all parties of the United Nations⁴⁷, but over time has formed into CIL. If a country were to violate Article 2(4), the rest of the world would view it as a breach of international law.

A. Cyberattacks and Use of Force

Problems arise when attempting to apply laws built on historical state practice to modern societal issues. Particularly when nations address issues such as cyberattacks in international law. Many issues are left unresolved, such as what constitutes a cyberattack? Is a cyberattack considered an unlawful use of force? These questions remain unsettled in the realm of international law, but are quickly approaching. Specific problems to the issue at hand also bring questions as to whether the alleged attack on Sony by North Korea violates international law.

Harold Koh, the U.S. Department of State Legal Adviser, addressed these issues of international law in cyberspace in the *American Journal of International Law*.⁴⁸ Koh was able to give answers settled in the application of international law in cyberspace, these answers are not only set by the United States, “but made diplomatically, in our submissions to the UN Group of Governmental Experts (GGE) that deals with information technology issues.”⁴⁹ First, although at least one country has refuted the idea that international law principles do not apply in cyberspace, the general consensus (including the United States) is that international law

⁴⁶ U.N. Charter art. 2, para. 4.

⁴⁷ There are currently 193 states that are a part of the United Nations. *Member States*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited May 16, 2015).

⁴⁸ *State Department Legal Adviser Addresses International Law in Cyberspace*, 107 AM. J. INT’L L. 243 (2013).

⁴⁹ *Id.*

applies.⁵⁰ Even if a nation disagrees with a concept that does not mean that it will not crystallize as CIL. These nations are termed “persistent objectors” to CIL, where they must refute from the beginning that the state practice is not one of international law.⁵¹ Another important point to note is that it does not have to be the nation itself acting, but if a group or organization “act[s] on the State’s instructions or under its direction or control . . . States are legally responsible for activities undertaken through putatively private actors, who act on the States instructions or under its direction or control.”⁵² I mention this important point because currently, North Korea has not taken responsibility for the actions against Sony. As of now, all that is known is that a group known as “The Guardians of Peace” committed the hack.⁵³ It does not matter that North Korea did not implement the attack directly, for if the United States connect North Korea to The Guardians then that is sufficient to make it an action of the state. In fact, after investigating, the FBI has announced that they are quite confident North Korea is responsible for the hack. The investigation found evidence that the hackers logged into Sony’s servers through North Korean Internet Addresses.⁵⁴

Koh also affirmed that a cyberattack “constitutes uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.”⁵⁵ He supports this position by

⁵⁰ *Id.* at 244.

⁵¹ INT’L LAW ASS’N, *supra* note 43, at 712.

⁵² *State Department Legal Adviser Addresses International Law in Cyberspace*, *supra* note 48, at 246.

⁵³ Cheryl K. Chumley, *Guardians of Peace Hackers Thank Sony for Scrubbing ‘The Interview,’* WASH. TIMES, Dec. 19, 2014, <http://www.washingtontimes.com/news/2014/dec/19/guardians-of-peace-hackers-thank-sony-for-scrubbin/>.

⁵⁴ Michael S. Schmidt, Nicole Perlroth & Matthew Goldstein, *F.B.I. Says Little Doubt North Korea Hit Sony*, N.Y. TIMES, Jan. 7, 2015, http://www.nytimes.com/2015/01/08/business/chief-says-fbi-has-no-doubt-that-north-korea-attacked-sony.html?_r=0.

⁵⁵ *State Department Legal Adviser Addresses International Law in Cyberspace*, *supra* note 48, at 244.

stating that in determining “whether a cyber operation would constitute a use of force, most commentators focus on whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons.” Basically, what this means is that if the act would cause death or some form of destruction similar to that of a use of weapons, it is a use of force.⁵⁶ However, is the term use of force more expansive than this definition? For instance, there are other cyberattacks that do not reach the level met by kinetic weapons. This issue relates to what exactly is meant by the Charter when it uses the word “force.” Nations disagree among the threshold required to be considered a use of force, the United States for instance says “there is no threshold for a use of force to qualify as an ‘armed attack’ that may warrant a forcible response.”⁵⁷

This is the issue that makes the matter at hand so perplexing. We have seen in the past that the “use of force” term is more expansive than “armed attack,” but no one can clearly define what all the term encompasses. The International Court of Justice (ICJ) has held in the past that it is enough to be considered a use of force, but not an armed attack to help supply rebels of another nation’s government with supplies and aid even though no actual attacks were committed.⁵⁸ To further explore this issue, NATO’s Cooperative Cyber Defence Center of Excellence (CCDCOE) created the “Tallinn Manual” to examine how settled principles of international law can apply to new issues in warfare.⁵⁹ The Tallinn Manual was created by an “International Group of Experts” (IGE), and is a compilation of many scholarly opinions expressing their viewpoints on modern international issues. The scholars were divided on the

⁵⁶ *Id.*

⁵⁷ *Id.* at 246-47.

⁵⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14.

⁵⁹ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 5 (Michael N. Schmitt gen. ed., 2013)

issue of what constitutes an armed attack as well, but one viewpoint taken was that the use of force depends on the severity of the attack, “a sufficiently severe non-injurious or destructive cyber operation, such as that resulting in a State’s economic collapse, can qualify as an armed attack.”⁶⁰ As most major issues in law, the authors of the manual could not come to a clear definition of a cyber use of force. “Its members merely agreed that States would make case-by-case assessments of non-injurious or destructive cyber operations, considering such factors as severity, immediacy of effect, invasiveness, military character, and so forth.”⁶¹

As previously mentioned, international law is a highly unsettled area. Some critics even argue that there is no such thing as international law, just international political issues. However, the fact that there is not a set code of international laws acts not only as one of its biggest weaknesses, but also as one of its biggest strengths. The fluidity and amorphousness of international law allows it to adapt and change as time progresses, as opposed to laws that get outdated or worthless as cultures grow. The beauty of CIL is in its name; it is based off of customs. What nations decide is appropriate can change as the world evolves, and the practices can evolve with it. With the growth of technology that has rapidly come into our lives in recent years, and is sure to grow even quicker in the future, I believe that the law is all but certain for cyberspace, especially in relation to cyberattacks and the use of force. I take the opinion that Koh’s view of a cyberhack only amounts to a use of force when it creates in similar results, as that of a kinetic attack is a waning one. If, as time progresses, more cyberhacks such as the one encountered by Sony occur, then this definition of the use of force will be sure to change. In the

⁶⁰ Michael Schmitt, *International Law and Cyber Attacks: Sony v. North Korea*, JUST SECURITY (Dec. 17, 2014), <http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/>.

⁶¹ *Id.*

coming years, when determining whether or not there has been a use of force, nations should not look to the nature of the target that has been attacked, but to the severity of the attack. A similar approach is already applied when looking at kinetic uses of force. For instance, while the death of a United States citizen occurring by the hands of another nation is without a doubt a travesty, it is not always considered a use of force, whereas should there be a mass attack on many citizens, one should expect quick reaction from the United States. It is the severity of the attack that needs to be analyzed when making the decision on the use of force, not the result. When a multi-million dollar corporation like Sony is attacked by a cyberhack like this, it should be considered a threat on the whole nation. This can be seen by all the information that was released by the hack. If they could do this to Sony, what if they were to infiltrate the technological interworking of other major corporations such as Wal-Mart. Hackers could possibly gain access to finances, and credit cards of Wal-Mart's customers. The result, although not physical damage like that of a hack on a nuclear plant, would nonetheless be catastrophic and is unallowable. While the damage here is not that severe, we should not view it any differently, because that would create too much ambiguity, and to develop as a consistent state practice,⁶² we must draw bright lines to pave the way for our future security.

B. United States Response

After deeming the cyberattack is in fact a use of force in violation of the UN Charter, what actions may the United States take in retaliation? President Obama has already ordered sanctions against North Korea, but the White House is calling these sanctions, the "first aspect of

⁶² One of the two requirements to grow into CIL.

our response.”⁶³ The Executive Order by President Obama allows sanctions on those that do business with North Korea. These sanctions will impede some of North Korea’s key relations by prohibiting access to U.S. financial systems to North Korea’s primary arms exporter, and their main intelligence agency.⁶⁴ How much further does the United States plan on retaliating? And at what point do the measures become illegal under international law? When discussing retaliation, President Obama stated “[w]e will respond proportionally, and we’ll respond in a place and time and manner that we choose.”⁶⁵

This may not be the only response that the United States will contain itself to. On December 24, 2014, the entire country of North Korea lost its Internet connection. This is not as significant as the entire United States losing its Internet because there is substantially less connectivity and access to the Internet in North Korea, it is still no small feat. The United States has not yet admitted to being the culprits of the act, but many signs indicate they are responsible.⁶⁶ Were the Executive Order, and the North Korean Internet shut down (assuming the United States is responsible) appropriate acts by the U.S. government under international law?

Under the UN Charter, a nation that faces an attack from a use of force is entitled to a right of self-defense.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council

⁶³ Zeke J. Miller, *U.S. Sanctions North Korea Over Sony Hack*, TIME (Jan. 2, 2015), <http://time.com/3652479/sony-hack-north-korea-the-interview-obama-sanctions/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Nicole Perlroth & David E. Sanger, *North Korea Loses Its Link to the Internet*, N.Y. TIMES, Dec. 22, 2014, <http://www.nytimes.com/2014/12/23/world/asia/attack-is-suspected-as-north-korean-internet-collapses.html>.

and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶⁷

When addressing the United States stance on self-defense from a cyberattack, Harold Koh said, that right “may be triggered by computer activities that amount to an armed attack or imminent threat thereof . . . warranted, the United States will respond to hostile acts in cyberspace as we would to any threat to our country.”⁶⁸ Further, when a nation enacts its right to self-defense, they are limited to what exactly they may do. “The principles of necessity and proportionality limit uses of force in self-defense and would regulate what may constitute a lawful response under the circumstances.”⁶⁹ When determining proportionality, a state must look at factors such as the effects of the attack to infrastructure within the nation; any potential harm that could arise, including the death of soldiers and civilians, and the total impact the attack will have on the nation, such as the effects on private networks that occurs from the attack.⁷⁰ So long as the response of the United States is proportionate and does not overstep the powers of the United Nations, the actions will be permitted under international law.

IV. Conclusion

Many questions remain unanswered on this highly controversial issue, but the heated issue between the United States and North Korea will pave the way as technology continues to be a more important part of our lifestyle. As the dust settles, there are many important points to focus on. A world leader that is so highly opposed to the United States will most likely not be bringing a lawsuit in the United States for being portrayed in a negative light, but as we have

⁶⁷ U.N. Charter art. 51

⁶⁸ *State Department Legal Adviser Addresses International Law in Cyberspace*, *supra* note 48, at 245.

⁶⁹ *Id.*

⁷⁰ *Id.*

analyzed today, it would most likely be pointless for them to raise the issue anyways. Our citizens and our court systems place a high value on our Constitutional right to the freedom of speech and will go to great lengths to protect it, even if that means political backlash from foreign nations. However, that means we must be willing to bear the cost of the backlash that will result from our mockery of characters that others look to and respect. While this time it may have only been a hack on a media company's business property and confidential emails, next time those emails could be of much more value, like from one of our political leaders.

As stated earlier, it is not certain whether or not under international law, the United States will be able to do anything in retaliation for these hacks. Although I believe a shift in the law is soon to come, many leaders in the field of international law would say that a cyberattack of this magnitude would not constitute an illegal use of force. Even if they do consider this a use of force, it must be remembered that the retaliation allowed for self-defense is limited to only that which is necessary and proportionate.